RECORD AND BRIEFS

FILED
JUL 10 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* REBECCA FRIEDRICHS AND FREEDOM FOUNDATION IN SUPPORT OF PETITIONER

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July 10, 2017

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QUESTION PRESENTED

Twice in the past five years this Court has raised serious concerns about the holding in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). Last term, this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016).

This case presents the same question presented in *Friedrichs*: should *Abood* be overruled and public sector agency fee arrangements be declared unconstitutional under the First Amendment?

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Rebecca Friedrichs is a veteran public school teacher in Orange County, California. Throughout her twenty-eight-year career, the government has forced her to fund the speech of the California Teachers' Association ("CTA"), National Education Association ("NEA"), and the local public sector union in her district simply because she is a public employee. Mrs. Friedrichs served as the lead plaintiff in a federal lawsuit, *Friedrichs v. CTA*, 136 S. Ct. 1083 (2016), which this Court considered last year. Her lawsuit reflected this Court's serious concerns with *Abood*, and sought to provide public sector workers the right to choose whether to fund union speech. After Justice Antonin Scalia's passing, this Court affirmed the Ninth Circuit's ruling by an equally divided Court, thus preserving *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). Mrs. Friedrichs has an interest in this case because it presents the same primary issue raised in her case.

Mrs. Friedrichs also seeks to ensure that if the Court overrules *Abood*, it makes clear that government employers and unions must obtain workers' affirmative consent before deducting union dues from their wages. Mrs. Friedrichs' personal experience shows that "opt-out" procedures threaten teachers' constitutional rights. Unions use these opt-out schemes to bully

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amici affirms that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

and isolate those workers who wish to become agency fee payers. Mrs. Friedrichs' friends and family members have fallen victim to opt-out schemes, and, thus unwittingly paid hundreds of dollars annually to unions. Unions have manipulated the privilege to "tax government employees" to undermine their First Amendment rights. *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 184 (2007). To make it easier for teachers to exercise their rights, Mrs. Friedrichs hosts her "Teacher Freedom Workshops," in which she helps educators navigate their opt-out processes.

The Freedom Foundation ("Foundation") is a nonprofit organization operating in Washington, Oregon, and California. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation largely focuses on public-sector labor reform, which it pursues through litigation, legislation, education, and grassroots activism. Since 2014, the Foundation has been informing workers affected by *Harris v. Quinn*, 134 S.Ct. 2618 (2014), of their First Amendment right to abstain from paying union dues. Based on its extensive *Harris*-related outreach, the Foundation has detailed knowledge about public sector unions' attempts to evade their constitutional obligations and prevent employees from learning of their constitutional rights and exercising them. The Foundation's expertise in this area will assist the Court in determining the proper scope of the question presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant certiorari to overrule *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). Whether this Court does or does not overrule *Abood*, it should make clear that government employers and unions must

obtain workers' affirmative consent before deducting union dues that cannot be compelled under the First Amendment. Otherwise, the First Amendment rights of workers are undermined by the very entities which have benefited from the compelled dues which years of experience have shown serve no compelling interest whatsoever. Constitutional rights undermined by deceptive schemes are no constitutional rights at all. This Court previously voiced concern over the constitutional effects of union opt-out schemes in *Knox v. SEIU 1000*, in which this Court warned that opt-out schemes "approach, if they do not cross, the limit of what the First Amendment can tolerate." *See* 567 U.S. 298, 313 (2012). Last term, the Court in *Friedrichs* explicitly considered whether opt-out schemes violated the First Amendment, Petition for Cert. at (i), *Friedrichs v. Cal. Teachers Assoc.*, 2015 WL 393856 (2015), but deadlocked upon the passing of Justice Antonin Scalia. *Friedrichs v. Cal. Teachers Assoc.*, 136 S. Ct. 1083 (2016).

Resolving the issue in this case, whether *Abood* is overruled, begs the constitutionally necessary question: when may a government employer and union seize dues? The First Amendment demands the answer to be: only after public workers affirmatively consent to the payment of union dues. If the Court grants certiorari and overrules *Abood* without addressing this issue, the freedom granted to public employees will prove illusory. Indeed, Mrs. Friedrichs' experience in California's public schools and the Foundation's outreach to *Harris*-affected workers makes this plain. So long as opt-out schemes are legal, public workers' First Amendment rights will remain elusive.

The Court should grant certiorari, overrule *Abood*, and reinstate the full First Amendment rights of

America's public servants. In so doing, it should craft a holding that allows those public servants to realize those rights. It can and should do both in this case.

ARGUMENT

I. MRS. FRIEDRICHS' EXPERIENCE DEMONSTRATES THAT UNIONS WILL CONTINUE TO DEPRIVE EMPLOYEES OF THEIR FIRST AMENDMENT RIGHTS IF THIS COURT OVERRULES *ABOOD* WITHOUT ALSO REQUIRING PUBLIC EMPLOYEES PRIOR, AFFIRMATIVE CONSENT BEFORE SUBJECTING THEM TO THE SEIZURE OF UNION DUES.

Teachers undoubtedly have the First Amendment right to resign membership in a union and become agency fee payers. *See Abood*, 431 U.S. at 233-36. Under *Abood*'s agency shop framework, public employees may decline union membership and pay only a reduced agency fee that covers their pro-rata share of the union's collective bargaining (chargeable) expenses but not the union's overt political advocacy (non-chargeable) expenses. *See id.* at 235-36. Of course, *Abood* failed to grapple with the fact that its agency fee paradigm still forced public employees to subsidize another's political speech. Chargeable union activities like contract negotiations with the government are inherently political expressions.

Abood's over-simplified financial framework created havoc, as illustrated by the many cases this Court subsequently decided to establish the fuzzy lines which define the contours of this Court's First Amendment labor jurisprudence. *See, e.g.*, *Harris*, 134 S. Ct. 2618; *Davenport*, 551 U.S. 171; *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). This Court has

had to continually reign in the schemes public sector unions devise to maximize the extraordinary privilege they have been granted to "tax government employees." *Davenport*, 551 U.S. at 184. The opt-out regime is the scheme public sector unions utilize most effectively to deprive public workers of their First Amendment rights.

Mrs. Friedrichs' experience bears this out. With the help of an opt-out scheme, the CTA has prevented many teachers from exercising even their limited *Abood* rights. For years, Mrs. Friedrichs has witnessed teachers fall for the "check the box" scam—one of the CTA's primary tactics to keep unknowing teachers in their union. *See* Alec Torres, *Teachers Challenge Compulsory Union Dues*, Dec. 17, 2013.[2]

In Mrs. Friedrichs's experience, when teachers ask their union representatives to become agency fee payers, union representatives instruct the teachers to "check the box" on a union membership card.[3] *Id.* But "checking the box" does not invoke teachers' constitutional right to pay reduced agency fees. "Checking the box" merely prevents the state from taking money from the teacher and directly sending it to a political action committee. *Id.* In other words, "checking the box" is neither a simple means of resigning union membership nor of becoming an agency fee payer. It simply excuses an employee from *one* of the ways the union engages in overt political activity. Even after

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[2] http://www.nationalreview.com/article/366513/teachers-challenge-compulsory-union-dues-alec-torres.

[3] A sample description of the CTA's union membership card describing how to "check the box" can be found here. Ben Spielberg, Friedrichs *and* Bain *Explained*, 34 Justice (Nov. 30, 2015), https://34justice.com/2015/11/30/friedrichs-and-bain-explained/.

"checking the box," full union dues will be exacted from her wages and much of that money will be devoted to a union's non-chargeable expenses.

The CTA does not readily inform objecting teachers of the process they must navigate to become *Abood* agency fee payers. *That* opt-out process requires much more than merely "checking the box." To opt out, a teacher must request in a specifically worded letter to be designated as an agency fee payer. *Id.* Once agency fee payer status has been established, the teacher will continue to pay full membership fees and political dues, and the unions will not inform her of the *other* process necessary to trigger a rebate of the political dues. Teachers have to discover from other workers who have navigated the process that they must also send an annual letter to CTA to request a rebate of the political portion of the dues. *Id.* And that letter must be sent to the CTA between September 1 and November 15. *Id.* If a teacher doesn't follow the proper opt-out procedures, the CTA gets to keep collecting the teacher's money. *See Mitchell v. Los Angeles Unified School District*, 963 F.2d 258, 262-63 (9th Cir. 1992) (questionably reiterating that "dissent cannot be presumed" when it is a labor union exacting the money). Only after following the proper procedures will the CTA send teachers a rebate for their political dues—which until the money is returned, is an interest-free loan to the union. Torres, *supra*.

Opt-out schemes create a perverse financial incentive for the CTA to complicate the "procedural safeguards" it devises to, ostensibly, "protect" teachers' *Abood* rights. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). The CTA enjoys a substantial financial windfall every time a teacher never learns of the opt-out process, or fails to navigate

it perfectly. It is little surprise that the CTA has spent tens of millions of dollars opposing ballot initiatives that would prohibit California's opt-out rule. *See California Proposition 32, The "Paycheck Protection" Initiative (2012)*, Ballotpedia.org (CTA spending $21 million dollars to prevent an opt-in requirement)[4]; *California Proposition 75, Permission Required to Withhold Dues for Political Purposes (2005)*, Ballotpedia.org (CTA spending $12 million dollars to prevent an opt-in requirement).[5]

Mrs. Friedrichs' experience with opt-out schemes also highlights the problem of union bullying. Although Mrs. Friedrichs opposed the CTA's activities, she initially joined the CTA so that she could have a voice. Penny Starr, *Teacher on Unions: "Felt Like Little Children Being Bullied on a Playground"*, CNSnews.com, Aug. 13, 2014.[6] But anytime Mrs. Friedrichs, or any other teacher, challenged how the CTA spent their dues, the union would bully them by alienating and intimidating them. *Id.* The CTA bullied Mrs. Friedrichs and other teachers like children on a playground when they questioned how the union spent their dues. *Id.*

Mrs. Friedrichs' bullying experience is not unique. Other agency fee payers endure bullying from pro-union teachers who paint them as "freeloaders." *See* Connor D. Wolf, *Teachers Unions Bully the Very Teachers They Claim to Protect*, The Libertarian

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[4] https://ballotpedia.org/California_Proposition_32,_the_%22Paycheck_Protection%22_Initiative_(2012).

[5] https://ballotpedia.org/California_Proposition_75,_Permission_Required_to_Withhold_Dues_for_Political_Purposes_(2005).

[6] http://www.cnsnews.com/news/article/penny-starr/teacher-unions-felt-little-children-being-bullied-playground.

Republic, Feb. 29, 2016[7]; Michael Finnegan, *Labor fears setback as Supreme Court hears case on union dues, fees*, Los Angeles Times, June 30, 2015.[8] Of course, it makes little sense to accuse an agency fee payer of freeloading, *Abood*, 431 U.S. at 236; but this harassment foretells what will happen to objecting teachers if the Court overrules *Abood* and does not create an opt-in requirement. Teachers opposed to the CTA are left with two unfavorable choices: raise their voices and endure bullying or continue to subsidize the overt electioneering of an organization they oppose. Opt-in regimes relieve workers of the incredible burden of speaking up and enduring the negative consequences.

An opt-out scheme compels workers to affirmatively identify themselves if they oppose union speech. That places an easy target on their back for union intimidation and reprisals. An opt-in system, which requires workers' affirmative consent before subjecting them to union dues, allows workers to privately consider and decide upon their constitutional rights. An opt-in system also guarantees that a public worker does not have to wade through the convoluted processes and "notices" unions devise to obscure their rights. Rather, the opt-in regime guarantees that, whatever schemes a union devises, the public worker at least: (1) knows of her rights, and (2) knows how to exercise those rights. No amount of union scheming can obscure these guarantees. Opt-out schemes are not "carefully tailored to minimize the infringement of free speech

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[7] http://thelibertarianrepublic.com/teachers-unions-bully-the-very-teachers-they-claim-to-protect/.

[8] http://www.latimes.com/local/politics/la-me-pol-california-unions-20150701-story.html.

rights." *Knox*, 567 U.S. at 313. They are carefully tailored to undermine workers' free speech rights.

II. THE FOUNDATION'S EXPERIENCE DEMONSTRATES THAT STATES AND UNIONS WILL DEPRIVE WORKERS OF THEIR FIRST AMENDMENT RIGHTS IF THIS COURT OVERRULES *ABOOD* WITHOUT REQUIRING WORKERS' PRIOR, AFFIRMATIVE CONSENT BEFORE SUBJECTING THEM TO THE SEIZURE OF UNION DUES.

If the Court grants certiorari and rules for Janus without also requiring workers' prior, affirmative consent to union dues exactions, the rights of full-fledged public employees will face the same sad fate as those of partial-public employees after *Harris*. The Foundation's experiences with Washington's partial public employees illustrates what lies ahead for full-fledged public employees.

In *Harris*, the Court refused to extend *Abood* and the imposition of agency fees to partial-public employees, like Washington's homecare providers (represented by SEIU 775) and childcare providers (represented by SEIU 925). 134 S. Ct. at 2638. After *Harris*, the Foundation launched an outreach program to inform both types of providers of their newly-acknowledged right. *See Boardman v. Inslee*, No. C17-5255 BHS, 2017 WL 1957131, at *1 (W.D. Wash. May 11, 2017). This outreach includes strategic mailings, electronic, multimedia, and social media contacts, and in-person canvassing of providers. When providers learned of their *Harris* rights, they often chose to exercise those rights. *See, e.g.*, Hana Kim, *Union leaders furious over door-to-door tactic targeting their members*, Aug. 3,

2016.[9] Most providers did not know they had a right to cease paying union dues, still believing they lived in a pre-*Harris* world. In fact, some never knew they were paying union dues or that they were represented by a union at all. *Id.*

Since *Harris*, SEIU 775, the union representing all homecare providers in Washington State, has erected substantial barriers to prevent providers it represents from learning of and exercising their right to withdraw membership and all financial support from the union. In short, *Harris* did little to change the day-to-day lives of these homecare providers.

A. SEIU Erects Significant Barriers to Stop Providers from Learning of their *Harris* Rights.

Washington homecare providers are paid by the state through a combination of local, state, and federal funds to provide care for disabled and elderly persons. Wash. Rev. Code 74.39A.240(3). They are public employees solely for collective bargaining purposes. Wash. Rev. Code 74.39A.270(1). Family childcare providers receive public subsidies to care for children from low income working families. Wash. Rev. Code 41.56.028. Homecare and childcare providers undoubtedly are partial-public employees affected by *Harris*. *See* 134 S. Ct. at 2638. Under *Harris*, the State of Washington and SEIU may not constitutionally compel providers to pay union fees as a condition of employment. *See id.* at 2644. However, SEIU has worked tirelessly to obscure that fact.

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[9] http://q13fox.com/2016/08/03/union-leaders-furious-over-door-to-door-tactic-targeting-their-members/.

After *Harris*, SEIU 775 unilaterally deemed every homecare provider in Washington who had not previously affirmatively objected to paying dues to be a consenting, dues-paying member. Decl. of Adam Glickman in Support of SEIU 775NW's Opp. To Pls.' Mot. for Class Certification ¶ 8, *Centeno v. Quigley*, No. 2:14-cv-00200-MJP (W.D. Wash. Feb. 11, 2014) ("Glickman Decl."). SEIU 775 has done little to effectively inform IPs about *Harris*. *See, e.g.*, Decl. of Joshua Sanabria in Support of Pls.' Mot. for Summ. Judg. ¶ 8, *Fisk v. Inslee*, Case No. 3:16-cv-05889-RBL (W.D. Wash. Jun. 1, 2017); Decl. of Becky Fisk in Support of Pls.' Mot. for Summ. Judg. ¶ 8, *Fisk v. Inslee*, Case No. 3:16-cv-05889-RBL (W.D. Wash. Jun. 1, 2017).[10] Therefore, thousands of homecare providers who never joined SEIU 775 before *Harris* were deemed to be full dues-paying union members simply because they had not objected. *See* Glickman Decl. ¶ 11. SEIU 775's sleight-of-hand resulted in a financial windfall of millions of dollars in its favor. However, providers were none the wiser because SEIU 775 and Washington State employed an opt-out scheme after *Harris* to continue seizing dues from providers who had never authorized the exactions or consented to union membership.

1. SEIU Engages in Abusive Litigation Tactics to Prevent Providers from Learning of their *Harris* rights.

Because Washington has been complicit in SEIU 775's scheme, the Foundation launched an outreach

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[10] In these declarations, the declarants attest that: "At the time I signed a SEIU 775 membership card, no one told me about my right under *Harris v. Quinn* to abstain from SEIU 775 membership and the payment of any dues or fees without penalty, and I was not aware of this right."

program to inform these partial-public employees of their rights under *Harris* and how to exercise them. *See Boardman*, No. C17-5255 BHS, 2017 WL 1957131, at *1. The Foundation's outreach to providers is First Amendment political speech. *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988); *SEIU Healthcare 775 NW v. Dep't of Soc. & Health Servs.*, 377 P.3d 214, 227-28 (Wash. Ct. App. 2016). These providers also have the First Amendment right to hear the Foundation's message. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.").

Shortly after *Harris*, the Foundation submitted requests for lists of homecare and childcare providers from state agencies pursuant to Washington's Public Records Act. Wash. Rev. Code 42.56 *et seq*. *SEIU Healthcare 775 NW.*, 377 P.3d at 218. Because providers are independent and scattered in residential locations across the state, the only way to communicate with them is to obtain their information under the Public Records Act. *See Harris*, 134 S. Ct. at 2640 (discussing how "any threat to labor peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes, either the customers' or their own"). For three years SEIU 775 and Washington State have worked to frivolously delay the disclosure of those lists to the Foundation.

First, the Washington agency responsible for maintaining the names of homecare providers repeatedly delayed disclosing the requested provider lists to the Foundation to give SEIU more time to acquire an injunction against disclosure. Maxford Nelsen, *Thousands of*

Workers Leave SEIU Due to the Freedom Foundation Outreach, Freedom Foundation, Oct. 7, 2015.[11] Next, SEIU 775 sued the Foundation to prevent the release of records. *Id.* SEIU 775 lost at every stage of litigation. *SEIU 775 NW*, 377 P.3d at 230, *review denied*, 186 Wash. 2d 1016 (2016). But the courts granted multiple temporary injunctions to prevent the release of the records while the case was being litigated, thus giving SEIU 775 the relief it truly sought—delay. *See Boardman*, No. C17-5255 BHS, 2017 WL 1957131, at *3 (noting that "the SEIU unions have used litigation tactics to prolong the release of the public records that are the underlying subject of this lawsuit, so that the records became outdated and useless by the date of their disclosure . . .").

More than two years after its request, the State finally disclosed the requested lists to the Foundation. Due to rapid provider turnover, the two-year-old records were largely useless to the Foundation. *See id.* Under Washington's Public Records Act, the Foundation was only entitled to records in existence at the time of the request, *Smith v. Okanogan Cnty.*, 994 P.2d 857, 862-63 (Wash. 2000), and could not get an updated list without making a new request—which would be subject to new litigation. The Foundation nonetheless requested an updated list of providers from the State in September 2016. Decl. of Maxford Nelsen in Support of Mot. for TRO ¶ 20, *Boardman v. Inslee*, Case 3:17-cv-05255 (W.D. Wash. April 5, 2017).

SEIU 775 sued again. *See* SEIU 775's Mot. for TRO Regarding the Freedom Foundation's Public Record Act, *SEIU 775 v. Lashway*, No. 16-2-04312-34 (Thurston

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[11] https://www.freedomfoundation.com/blogs/liberty-live/thousands-of-workers-leave-seiu-due-to-freedom-foundation-outreach.

Cnty. Superior Ct. Oct. 27, 2016). The Foundation prevailed before the trial court, but an appellate court commissioner again granted a temporary injunction to preserve the "fruits" of SEIU 775's appeal. In this way, though the Foundation was legally entitled to the information for over two years, SEIU 775 prevented the Foundation from obtaining updated provider lists and prevented thousands of providers from learning of their rights.

SEIU 775 uses the same abusive litigation strategy to prevent the Foundation from learning times and locations of providers' state-mandated contracting meetings. *SEIU 775 v. Dep't of Soc. & Health Servs.*, No. 48881-7-II, 2017 WL 1469319 (Wash. Ct. App. April 25, 2017). Providers must attend these meetings to sign paperwork before receiving subsidies for their work; but the State must give time at the appointments for SEIU 775 representatives to meet face-to-face with providers. *Alvarez v. Inslee*, No. 16-5111 RJB, 2017 WL 1079923, at *2 (W.D. Wash. Mar. 22, 2017). Included in that paperwork is a union membership application. *See id.* If the Foundation could obtain the times and location of contracting appointments, it could leaflet information to providers to educate them regarding their *Harris* rights. SEIU 775 has again lost at every level, but continues to enjoy a "temporary injunction" protecting the fruits of its now-discretionary appeal to the Washington Supreme Court.

2. SEIU Bought a Statewide Ballot Initiative to Prevent Providers from Learning of their *Harris* rights.

After suffering consistent defeats in its abusive litigation strategy, SEIU realized it would need a long-term solution to keep providers in the dark about their rights. So it turned to the statewide ballot initiative

process. SEIU poured nearly $2 million[12] into creating and funding Initiative 1501 ("I-1501")—entitled "Washington Increased Penalties for Crimes Against Vulnerable Individuals measure." *Washington Increased Penalties for Crimes Against Vulnerable Individuals, Initiative 1501 (2016)*, Ballotpedia.org.[13] Ostensibly, I-1501 stiffened criminal and civil penalties for identity theft perpetrated against seniors or other vulnerable individuals. But its true purpose was to eliminate the Foundation's access to provider info, once and for all. After I-1501, *only* SEIU may obtain any homecare or childcare provider information from the state. *Id.* SEIU 775's Secretary-Treasurer chaired the official political action committee supporting I-1501. Decl. of Adman Glickman in Support of Campaign to Prevent Fraud & Protect Seniors Mot. to Intervene ¶ 2, *Boardman*, No. 3:17-cv-05255 (W.D. Wash. April 10, 2017). And SEIU 775 publicly admitted that I-1501 was intended to stop the Foundation's outreach to providers. Ashley Gross, *How A Fight Between SEIU 775 And A Conservative Think Tank Led To An Initiative On Identity Theft*, KNKX.org (Jul. 8, 2016).[14] Because of I-1501, which was approved by Washington voters in November 2016, the Foundation can no longer obtain provider information from the state. *Boardman*, No. C17-5255 BHS, 2017 WL 1957131, at *1.

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[12] Of the $1,883,888.15 received by the pro-1501 political action committee during the 2016 election, all but $50 came from SEIU 775 and SEIU 925.

[13] https://ballotpedia.org/Washington_Increased_Penalties_for_Crimes_Against_Vulnerable_Individuals,_Initiative_1501_(2016).

[14] http://knkx.org/post/how-fight-between-seiu-775-and-conservative-think-tank-led-initiative-identity-theft.

Every daily newspaper in Washington editorialized against I-1501. Ballotpedia.org (I-1501), *supra*. For instance, the *Seattle Times* described I-1501 as "a Trojan horse" that is "being run by a deep-pocked special-interest group [SEIU]." Seattle Times editorial board, *Reject I-1501 and urge lawmakers to address identity theft*, Seattle Times (Oct. 4, 2016).[15] Because I-1501 passed, the Foundation can no longer obtain the names of IPs or childcare providers in Washington. *Boardman*, No. C17-5255 BHS, 2017 WL 1957131, at *1.

The Foundation is currently suing Washington State over the constitutionality of I-1501 in U.S. District Court for the Western District of Washington. *Boardman*, No. C17-5255 BHS, 2017 WL 1957131. Shortly after the Foundation filed suit, the pro-I-1501 political action committee moved to intervene in that suit. *Id.* at *1. Although the district court granted the intervention motion, it expressed concern that allowing the campaign committee to intervene would cause undue delay or prejudice to the parties, given the Foundation's experience with SEIU in state courts. The Court noted that "[t]here is no dispute that the Campaign is a product of SEIU unions' efforts to pass I-1501." *Id.* at *3. It also observed that "[SEIU 775 and SEIU 925] have used litigation tactics to prolong the release of public records . . . so that the records became outdated and useless by the date of their disclosure." *Id.*

The Foundation's experiences alongside Washington providers serve as an omen. In *Harris*, the Court declined to extend *Abood* to partial-public employees but also declined to address whether unions must obtain those workers' affirmative consent before exacting

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[15] http://www.seattletimes.com/opinion/editorials/reject-i-1501-and-urge-lawmakers-to-address-identity-theft/.

dues from their wages. As a result, unions like SEIU have nullified the Court's ruling in *Harris* by making it virtually impossible for providers to learn about and exercise their *Harris* rights. The same fate awaits full-fledged public employees should the Court overrule *Abood* but fall short of requiring workers' prior, affirmative consent to union dues exactions

Requiring unions to obtain consent before exacting dues from public employees' wages would not eliminate all the obstacles workers face when attempting to learn and exercise their rights. *See, e.g.*, Pat Kessler, *Accusations Of Fraud At PCA Union Swirl Amid Contract Vote At State Capitol*, CBS Minnesota, May 8, 2017 (discussing fraud allegations in certifying home healthcare aid providers in Minnesota).[16] But it would eliminate a major obstacle. Moreover, requiring workers' prior, affirmative consent would impose a minimal burden on unions. *See Michigan State ALF-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997). Opt-in regimes also encourage unions to be more responsive and accountable to their members—just like any other trade or professional organization must be. If it is illegal to compel financial support of a private entity's speech, it follows that the private entity should not be permitted to unilaterally deem someone a "member" and take their money without their consent.

B. Workers Often Choose to Stop Paying Union Dues When They Learn of Their Rights.

SEIU 775's and SEIU 925's response to *Harris* is a tale of two unions. After *Harris*, SEIU 925 removed its

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[16] http://minnesota.cbslocal.com/2017/05/08/pca-union-contract-vote/.

agency shop provision and now operates as an "opt-in" union. Whereas SEIU 775, as stated above, replaced its agency shop provision with an opt-out scheme. What were agency fees prior to *Harris* became union dues from "members" after *Harris*, and providers were none the wiser. Nelsen, *supra*.

These approaches produced starkly different results. Since *Harris*, SEIU 925's membership has decreased to 36.4% of the bargaining unit. Appendix, Table A. In contrast, SEIU 775's membership has only decreased to 86.4% of the bargaining unit. Appendix, Table B. The decrease in SEIU 925's membership illustrates the power of worker choice. SEIU 775's staying power illustrates the effectiveness of the opt-out scheme and its effort to stymie the Foundation's outreach.

In August 2014, two months after this Court decided *Harris* and after SEIU 925 implemented an opt-in regime, only 61.6% of childcare providers paid any dues to that union. But SEIU 775's numbers didn't budge. 99.5% of IPs remained full dues-paying members of SEIU 775 in August 2014 because SEIU 775 deemed non-objecting homecare providers to be consenting dues-paying members.

In July 2016, after years of SEIU's frivolous litigation, the Foundation finally began communicating with a subset of homecare providers for whom it could obtain updated information. *See* Brody Mullins, Antiunion Campaign Goes Door-to-Door, Wall St. J., Aug. 17, 2016.[17] Provider response was swift and resolute. In the first month the Foundation

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[17] https://www.wsj.com/articles/antiunion-campaign-goes-door-to-door-1471454218.

communicated with these homecare workers, SEIU 775's membership dropped by about 5%.

Whether homecare or childcare providers join a union is a personal choice. But that choice is undoubtedly being undermined. As shown from the numbers above, if workers are informed of their rights, they often choose to exercise those rights. It's unsurprising that unions want to stop workers from learning of their rights; union dues will decrease if employees become informed and choose to opt out. *But see Davenport*, 551 U.S. at 185 ("[U]nions have no constitutional entitlement to the fees of nonmember-employees."). Unions should not receive windfalls for deceptively collecting membership dues from unsuspecting workers. *See Knox*, 567 U.S. at 312. Yet opt-out schemes do just that.

III. MANY WORKERS WILL PAY UNION DUES WHO OTHERWISE WOULD NOT IF AFSCME CAN TAKE DUES WITHOUT FIRST GETTING WORKERS' PERMISSION.

Social scientists have long studied the effects of setting default options, i.e. choosing between an opt-out scheme and opt-in procedure. Those studies have repeatedly confirmed that people tend to stick with the default option presented to them because of the human tendency to not act. *See* Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (2008), *supra*, at 85.

Thus, it is entirely predictable that unions would be hostile to Mrs. Friedrichs, the Foundation, and others who inform public employees of their constitutional rights. If employees know about their rights, which an opt-in regime would ensure, unions like the CTA and SEIU 775 could no longer exploit workers' ignorance.

A. Choice Architecture Shows that Default Options Often Dictate People's Choices.

Choice architecture—the science about how environmental features influence decision making—shows that many public employees are hoodwinked to pay for political causes with which they disagree. Choice architecture theorizes that people tend to follow a default option, even if they disagree with the option or the option is bad for them. Thaler & Sunstein, *supra*, at 85. It is well established that "the default option will be chosen more often than if another option is designated as a default." Eric. J. Johnson et. al., *Beyond Nudges: Tools of a Choice Architecture*, 23 Marketing Letters 487, 488 (2012). People tend to adhere to their default choice, regardless of its potential deleterious effects. Thaler & Sunstein, *supra*, at 85. By setting up a particular option as a default, choice architecture will heavily influence outcomes. "In fact, [the default option] can be decisive." Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics & Paternalism*, 122 Yale L.J. 1826, 1834 (2013).

Default options are powerful because of the "status quo bias." This bias recognizes that people generally remain in any given situation if it presents the path of least resistance. Thaler & Sunstein, *supra*, at 34-35, 85. The status quo bias is easily exploitable given society's common inattention to detail and tendency for inaction. *Id.* at 35.

Because of the status quo bias, people will stick with default options, even long after it becomes clear that the default option is undesirable. Thaler & Sunstein, *supra*, at 85-87. As an example, choice architecture suggests that those who purchase automatically renewable magazine subscriptions will likely not expend the

effort to cancel those subscriptions, even if the magazines are never read. Continued renewals are the path of least resistance. Thus, it is preferred. *See id.* at 35.

Retirement savings provide another example of choice architecture in action. One study from a Fortune 500 firm shows that under an opt-in scheme, 37.4% of its recent hires enrolled in its 401(k) retirement plans. Brigitte Madrian and Dennis Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. Econ. 1149, 1159-60 (2001). Yet under an opt-out scheme, enrollments more than doubled to 85.9%. *Id.* Another study revealed similar expansions. Under an opt-in procedure, between 26% to 43% of employees participated in the company's retirement plan after six months. James Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance*, 16 Tax Pol'y & Economy 67, 76 (2002). Under an opt-out scheme, participation tripled, ranging between 86% and 96% for employees employed for six months. *Id.* Such significant expansions, based solely on opt-in verses opt-out schemes, reveal that the employees' choices in opt-out schemes do not actually correlate to those employees' preferences.

Because of the power of default choices, there is little surprise that the CTA and SEIU 775 choose to collect membership dues via an opt-out scheme.

B. Labor Unions Exploit the Status Quo Bias to Keep Workers in Ignorance.

Mrs. Friedrichs and the Foundation do not make a novel argument. Unions have repeatedly been caught red-handed trying to exploit people's tendency towards inaction. In *Seidmann v. Bowen*, 499 F.3d 119 (2d.

2007), the Second Circuit considered whether requiring dissenting workers to renew their objection to joining a union every year violated this Court's decision in *Hudson*. The Second Circuit concluded that it did. *Seidman*, 499 F.3d at 125-26. That court observed that a labor union sought "to take advantage of inertia on the part of would-be dissenters who fail to object affirmatively, thus preserving more union members." *Id.* at 126. In plainer terms, the labor union in *Seidmann* wanted to exploit the status quo bias. This rationale could not survive this Court's holding in *Hudson*, and thus this procedure violated the First Amendment. *Id.*

A Texas union also tried to exploit people's tendency for inaction by requiring dissenting employees to renew their objections to union dues annually. *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998). The Fifth Circuit too noted that these procedures did not meet *Hudson*'s requirements because they did not minimize the infringement of dissenting employees' constitutional rights. Moreover, the Eastern District of Virginia has held that a similar annual objection requirement violates the First Amendment. *Lutz v. Int'l Ass'n of Machinist & Aerospace Workers*, 121 F.Supp.2d 498, 507 (E.D. Va. 2000).[18]

Unions experience a boon by exploiting the status quo bias. Consider *FEC v. National Education Association (NEA)*, for instance. 457 F.Supp. 1102 (D. D.C. 1978). In the last year that the Kentucky NEA sought

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[18] There is a circuit split over whether requiring nonmembers to annually object to union dues violates the First Amendment. *See Abrams v. Commc'ns Workers of Am.*, 59 F.3d 1373, 1381–82 (D.C.Cir.1995) (upholding requirement employee must object to union dues annually); *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir.1987) (same).

teachers' permission before taking their money, only 2,854 of 65,000 members chose to contribute to the union. *Id.* at 1108. But in the first year the Kentucky NEA began requiring teachers to opt out of paying union dues, that union collected dues from 21,463 members—a ten-fold increase from the prior year. The court concluded that this "high success rate raises a strong inference that a substantial number who used payroll deduction for their dues did not know the additional dollar contribution also was being deducted." *Id.*

Simply, unions have repeatedly chosen to implement an opt-out scheme to exploit people's tendency for inaction. This decision places public workers' constitutional rights in jeopardy. *See Knox*, 567 U.S. at 313.

CONCLUSION

Opt-out schemes are carefully tailored to undermine workers' free speech rights, as unions have illustrated for decades. But opt-in regimes guarantee that, whatever schemes unions devise to undermine this Court, the public worker at least: (1) knows of her rights, and (2) knows how to exercise those rights. No amount of union scheming can obscure these guarantees under an opt-in regime.

Thus, the petition for a writ of certiorari should be granted, and this Court should specifically ask the parties to address whether a union must obtain an employee's affirmative consent before taking dues from them.

Respectfully submitted,

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July 10, 2017

APPENDIX

APPENDIX

Table A is a tabulation of the total percentage of members and non-members in SEIU 925 between July 2014 and April 2017. This data was compiled from numbers obtained from Washington State via a public records request.

Table B is a tabulation of the total percentage of members of members and non-members in SEIU 775 between July 2014 and April 2017. This data was compiled from numbers obtained from Washington State via a public records request.

Table A

Percentage of Childcare Providers who are Members of SEIU 925

Month	Members	Members	Non-Members	Non-Members
Jul-14	6633	100.0%	0	0.0%
Aug-14	4212	61.6%	2629	38.4%
Sep-14	4499	66.9%	2229	33.1%
Oct-14	4275	64.2%	2387	35.8%
Nov-14	4306	63.7%	2453	36.3%
Dec-14	3739	54.7%	3097	45.3%
Jan-15	3675	55.0%	3149	45.0%
Feb-15	3607	54.0%	3074	46.0%
Mar-15	3609	53.4%	3145	46.6%
Apr-15	3622	52.8%	3235	47.2%
May-15	3738	53.2%	3286	46.8%
Jun-15	3567	51.3%	3385	48.7%

Jul-15	3577	50.8%	3463	49.2%
Aug-15	3451	48.6%	3652	51.4%
Sep-15	3367	48.0%	3651	52.0%
Oct-15	3218	46.6%	3687	53.4%
Nov-15	3177	44.8%	3922	55.2%
Dec-15	3088	43.2%	4061	56.8%
Jan-16	3060	43.1%	4034	56.9%
Feb-16	2976	42.5%	4028	57.5%
Mar-16	2926	41.5%	4128	58.5%
Apr-16	2921	41.8%	4070	58.2%
May-16	2890	40.8%	4189	59.2%
Jun-16	2890	40.7%	4204	59.3%
Jul-16	2897	41.0%	4172	59.0%
Aug-16	2912	40.9%	4213	59.1%
Sep-16	2837	39.8%	4284	60.2%
Oct-16	2817	40.2%	4197	59.8%
Nov-16	2773	38.7%	4401	61.3%
Dec-16	2707	37.8%	4452	62.2%
Jan-17	2638	36.8%	4533	63.2%
Feb-17	2602	36.8%	4464	63.2%
Mar-17	2594	36.8%	4450	63.2%
Apr -17	2576	36.4%	4500	63.6%

Table B

Percentage of Individual Providers who are Members of SEIU 775

Month	Members	Members	Non-Members	Non-Members
Jul-14	33483	99.9%	48	0.1%
Aug-14	33558	99.5%	173	0.5%
Sep-14	33239	98.7%	421	1.3%
Oct-14	33193	98.1%	653	1.9%
Nov-14	33167	98.0%	678	2.0%
Dec-14	33232	97.9%	706	2.1%
Jan-15	33301	97.8%	741	2.2%
Feb-15	33121	97.8%	753	2.2%
Mar-15	33108	97.5%	844	2.5%
Apr-15	33400	97.4%	881	2.6%
May-15	33442	97.5%	862	2.5%
Jun-15	34901	97.5%	909	2.5%
Jul-15	33677	97.0%	1052	3.0%
Aug-15	33725	97.0%	1056	3.0%
Sep-15	33634	96.7%	1134	3.3%
Oct-15	33708	96.7%	1153	3.3%
Nov-15	33659	96.6%	1181	3.4%
Dec-15	33777	96.6%	1195	3.4%
Jan-16	33912	96.5%	1223	3.5%
Feb-16	33761	96.4%	1268	3.6%
Mar-16	33721	96.1%	1368	3.9%

Apr-16	31879	94.2%	1956	5.8%
May-16	32460	94.2%	1984	5.8%
Jun-16	32678	93.9%	2132	6.1%
Jul-16	31144	89.1%	3797	10.9%
Aug-16	30887	89.1%	3764	10.9%
Sep-16	31477	86.2%	5045	13.8%
Oct-16	32061	88.1%	4321	11.9%
Nov-16	31617	89.5%	3729	10.5%
Dec-16	32307	89.4%	3834	10.6%
Jan-17	32520	89.3%	3891	10.7%
Feb-17	31975	89.0%	3958	11.0%
Mar-17	32211	88.4%	4220	11.6%
Apr-17	32148	88.6%	4131	11.4%